United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

ORIGINAL 75-4226

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-4226

PARSAM SRI THAKUR and
VELLAMA SRI THAKUR,

Petitioners,

v.

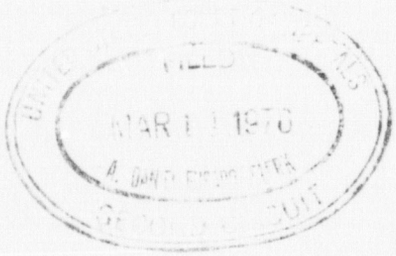
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for Review of Deportation Order

PETITIONERS' REPLY BRIEF

EDITH LOWENSTEIN
Attorney for Petitioners
36 West 44th Street
New York, N.Y. 10036
(212) 661-5740



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PETITIONERS' REPLY BRIEF

The respondent, in urging affirmation of the decision made by the Board of Immigration Appeals, states both the law and the facts as taken from the administrative record and ignores the main thrust of petitioners' argument

that the administrative record as certified by the respondent is not in accordance with the rules of this Court and does not permit this Court even a minimum of meaningful judicial review.

The petitioners respectfully submit that the one-sided authority given to the respondent (the government) in immigration cases restricts the review of the Court of Appeals to what the respondent considers appropriate. Failure to consult the petitioners regarding the administrative record is in violation of the Fifth Amendment of the United States Constitution and in violation of the Federal Rules of Appellate Procedure (28 U.S.C. 17(b)) and the Rules of Appeals promulgated by this Court.

THE FEDERAL RULES OF APPELLATE PROCEDURE

The Federal Rules of Appellate Procedure relating to the record in cases of review of administrative procedures provide that such review takes place on the basis of the petition for review, the administrative record and the briefs, 28 U.S.C., Rules 15-20.

28 U.S.C. (Rule 17(b)) provides that either the complete record of the case, duly certified must be submitted to the Court of Appeals or that upon stipulation

of the parties a list of all documents, transcripts, exhibits and other material constituting the record may be filed and that this list will be certified and be deemed the record.

Regarding the alternative method, Rule 17(b) says, "the agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency." (Emphasis supplied)

It should be noted that the Federal Rules of Appellate Procedure, as well as the analysis of the rules prepared by the Committee on Federal Courts of the Association of the Bar of the City of New York, at all times when discussing certification of the record refer to "parties" in the plural and not in the singular form.[1/]

It has been accepted practice that in immigration cases the administrative record is filed by the respondent without consultation with the petitioner.[2/]

It is respectfully submitted that such one-sided action of one of the two litigating parties is

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[1/] Appeals to the Second Circuit, prepared by the Committee on Federal Courts, The Association of the Bar of the City of New York, pp. 13, 15.

[2/] See Gordon & Rosenfield, Immigration Law and Procedure, p. 8-70.1.

unfair and in direct violation of existing rules and due process of law.

HISTORICAL BACKGROUND

Sec. 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a) was enacted by Congress in 1961 for the stated purpose of simplifying and expediting the Judicial Review of deportation orders.

At the time many experts in the field objected to the idea that the first step in the Judicial Review procedure in all cases would be before the United States Court of Appeals.

The objections were two-fold: it was believed that the new procedure would interfere with the alien's right to have his case considered in its entirety in one court which was possible under the declaratory judgement action started before a District Court.

It also was felt that the Court of Appeals would treat the review like an appeal and not as a lower court on occasion had done, permit the addition of factual material in connection with Motions for Summary Judgement, and where necessary permit trial of controverted facts. Under

8 U.S.C. §1105a, on the other hand, as the instant case so eloquently shows, the record on which the Court decides the case is selected by one of the litigating parties.

The legislative history of the provision makes it clear that Congress in enacting §1105a aimed at what was considered the abuse of the judicial process by Communists and criminals.[3/] The Department of Justice, in urging enactment of the bill, cited an earlier House Report as follows:

> "The Committee on the Judiciary has been disturbed in recent years to observe the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country. The alien whose sole immigration offense is, perhaps, a defect in his visa, or an overextended stay as a visitor, usually accepts the order of deportation and departs. Other aliens, mostly subversives, gangsters, immoral, or narcotic peddlers, manage to protract their stay here indefinitely only because their ill-gotten gains permit them to procure the services of astute attorneys who know how to skillfully exploit the judicial process." (H. Rept. No. 423, 86th Cong., p. 2)

3/ For discussion of this matter see H. Rept. No. 565, 87th Cong., 1st session, June 22, 1961, pp. 7-13.

In an ideal world court action might not be necessary. It should not be necessary for a person of the stature of Dr. Thakur to go to the second highest court of the country in order to obtain permission to depart voluntarily, but the grant of this minimum discretionary relief is of such vital importance to the petitioners that they have no alternative but to appeal to this Court.

When Congress framed 8 U.S.C. 1105a it clearly addressed itself to review of deportability only. Later regulations put into effect by the Immigration Service and deemed valid by the courts have placed all applications that an alien may make in connection with deportation hearings within the scope of the judicial review bill. All of them, sometimes inconsistent, must be made at the deportation hearing. Some discretion is left to the District Director.

Unless petitioners' cases in their entirety are heard by this Court, their judicial review is incomplete.

THE CASES

Not many decisions discuss in detail what material should properly be included in the administrative record. 28 U.S.C.A. §2112 sets the standards for certification of the record and provides that the administrative record which is to be the basis of the Court's ruling is placed before the Court in accordance with rule 17(b). That rule provides, "the agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency."

Generally speaking the review of decisions made by administrative agencies prior to 8 U.S.C. 1105a vary substantially from the review of deportation orders. The administrative record in an Inter-State Commerce Commission case, Federal Aviation matters, or Federal Trade Commission matters usually includes thousands of pages of testimony and other evidence. The administrative review procedure was developed because it was physically impossible for judges in the Court of Appeals or the District Court to acquaint themselves with the evidence accumulated in administrative proceedings. They therefore

had to rely on the decision of an appointed referee who often spent years evaluating the evidence and reaching conclusions. The Court would review his findings in the light of the evidence.

The analogy to an immigration case in this context is pitiful. Frequently, as in the instant case, an abbreviated administrative hearing takes place without counsel. The record does not contain facts or even law on which this Court can base a substantive judicial review. Unless the judicial review of deportation cases is considered a procedural formality, the Court should be able to examine the entire administrative file and not just those portions selected for the Court's attention by the government.

The comparatively few cases discussing the point favor inclusion of material in the administrative record. In National Courier Ass'n. v. Board of Gov. of Fed. R.S., 516 F.2d 1229, the question arose and the Court stated:

> "The Government takes the position that internal staff memoranda are never part of the record, since such documents are not within the statutory definition of the record as 'the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency.' 28 U.S.C. § 2112(b) (1970).

> See also Fed.R.App.P. 16. We think a fuller analysis is called for. Private parties and reviewing courts alike have a strong interest in fully knowing the basis and circumstances of an agency's decision. The process by which the decision has been reached is often mysterious enough without the agency's maintaining unnecessary secrecy. To be sure, the agency may have a strong interest of its own in keeping internal documents from public view, but it will normally be far easier for the agency to establish its interest in suppressing such documents than for the private litigants to establish their interest in exposing them to judicial scrutiny. The proper approach, therefore, would appear to be to consider any document that might have influenced the agency's decision to be 'evidence' within the statutory definition, but subject to any privilege that the agency properly claims as protecting its interest in non-disclosure. at 1241.

See also Environmental Defense Fund, Inc. v. Environmental Protection Agency, 510 F.2d 1292; Bradley v. Weinberger, 483 F.2d 410; Consumer's Union of the U.S., Inc. v. Federal Power Commission, 510 F.2d 656.

In determining arbitrariness, capriciousness, or insubstantiality of administrative decisions it is not necessary that court review always be restricted to the record before the administrative body. Beckham v. United States, 375 F.2d 782.

Included in the certified record, by choice of the petitioners should be sufficient background material from the administrative file to enable this Court to obtain a complete picture of the case.

Dr. Thakur in 1974 was a student at New York University preparing himself for the doctoral degree in Child Psychology. Approximately eight months before he had completed his studies, which started in 1970, he applied for an extension of the student visa. The application was denied on November 5, 1974 (p. 10, Petitioners' Brief). It is quite possible that the denial was erroneous, both as to law and facts. For instance, one of the reasons for the denial was "1.f. You have applied for an immigrant visa. You have no intention of returning to Guyana."

In fact Dr. Thakur has not applied for an immigrant visa, although he is on the visa waiting list. It would be impossible for him to apply for a visa unless he returns to Guyana, which at this point he would very much like to do.

Another possible legal error in the letter of November 5, 1974 was Dr. Thakur's part-time job at La Guardia Community College in a position "which many United States citizens, residents, and taxpayers need in this period of high unemployment." Under the regulations of the Immigration Service it is not a violation of status for an alien student to accept on-campus employment, particularly if such employment contributes practical experience in the area of the student's specialty.[4/]

Without going into the question whether the employment at La Guardia Community College was lawful or not, the reason for the denial was legally incorrect. Had Dr. Thakur availed himself at that time of the services of a knowledgeable attorney, it is quite possible that his case could have been turned around. Yet this denial, which forms the basis of the Order to Show Cause, the Government's Exh. 1 (A-13), has not been made part of the record file, despite the fact that under #5 of the Order to Show Cause the date of this questionable exhibit coincides with the date inserted in the Order to Show Cause.

[4/] 8 C.F.R. 214.2(f)(6)

The Transcript of Deportation Hearing is an Incomplete Record for the Purposes of Judicial Review.

The transcript of the deportation hearing which is part of the certified record (Petitioners' App., A-9 to A-12) does not reflect the facts on which the decision of the Immigration Judge was based. The petitioners appeared without counsel at a so-called M A S H proceeding (Mass Accelerated Special Inquiry Hearing). These hearings save time for the Government in cases where the alien is clearly deportable. The disadvantage is that aliens without counsel will concede deportability readily and sometimes incorrectly.

One of the consequences of the M A S H hearings is that the transcript of the hearing rarely contains sufficient facts to permit a proper review of the case. The significant part of the transcript is found on page A-10 of Petitioners' Appendix, "Government has had an opportunity to discuss this case with the respondents".

Undoubtedly this "off the record" conversation showed that there are substantial equities in the case, including the male respondent's interrupted studies (A-12).

The transcript is silent on whether other equities were discussed. The result of the hearing was a printed form on which two items were inserted, namely the date of voluntary departure and the place of deportation if the aliens were not to depart.

Thereafter, an attempt was made to obtain an extension of voluntary departure and in a sparse decision dated August 19, 1975, the Immigration Judge denied a Motion for Extension of Voluntary Departure. An extension of the departure date had also been denied by the District Director on June 3, 1975 and the Board of Immigration Appeals dismissed the appeal September 29, 1975.

CONCLUSION

It is respectfully submitted that the administrative record as presently before the Court does not permit a meaningful review of the administrative proceedings, that whatever there is in the record demonstrates the alien to be statutorily eligible for voluntary departure and that the argument contained in the Government's brief, while reciting standard law, does not meet the petitioners' contention.

Respectfully submitted,

EDITH LOWENSTEIN
Attorney for Petitioners

Dated: March 12, 1976

2 Copies Received

Date March 11, 1976

Firm U.S. Attorney's Office Hon. Robert B. Fiske, Jr.

By Pauline P. Irons